have it for the term of protection, action on the case lies for the deceit. TANFIELD. That is, for deceit to the court of the King, and it is not in vain that in all the books of precedents for this action there is always a warranty expressed, and that should be annexed to the bargain, otherwise no action lies except for victual; . . . and if one asks of me whether my horse ambles or trots, and I say he ambles and in verity he trots, and we bargain, shall this man have an action? It seems not, for it was his own credulity which deceived him.

"POPHAM. This case is a dangerous case and may be the cause of a multitude of actions, if it be thought that the bare affirmation of the vendor causes the action; but that is not so, but there must be a *sciens* in the vendor that the vendee will not get the effect of his bargain, and with intent to deceive. So if I have a horse which is secretly wounded so that he cannot live more than a day or two, and I knowing this sell to J. S., and the horse afterwards dies, J. S. shall have an action on the case against me, for that I sold him a thing of which I knew he could not have the benefit; but if J. S. sells the horse over and affirms him to be sound, the second vendee shall not have an action since his vendor did not know that the horse was thus mortally and privily wounded; and if one sells goods to which he has no title knowingly, and they are taken by the owner, the vendee shall have an action, but if the vendee sells them again not knowingly, no action lies; and so in the case at bar, the principal matter is that the defendant, knowing the stone to be counterfeit, sold it to the plaintiff for a Bezers Stone when in the knowledge of the vendor the vendee could not have the profit. . . . The cause of action is the *sciens* that the stone was not a Bezers stone, and the selling with intent to deceive. . . .

In Michaelmas Term, 4 James, this case was moved again by *Heale*. POPHAM said that it was of such importance that he thought it proper that it should be considered by all the judges of England, for if it should be decided for the plaintiff it would trench on all the contracts in England, which would be dangerous. [He went on to restate the case and his prior opinion] . . . in every case there is no need of affirmation that the goods are the proper goods of the vendor, for that is implied in the sale.

"TANFIELD. I will reserve my opinion in the principal case, but doubtless it is agreed by all that if in this case '*sciens le defendant*' were omitted the plaintiff would not recover. . . . *Et adjournatur.*"

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# RECENT CASES.

AGENCY — AGENT EXCEEDING HIS POWERS — SUBROGATION. — An agent with power to sell, but not to mortgage, mortgaged the lands of his principal, and without his knowledge or consent appropriated the proceeds to the discharge of a prior valid mortgage. *Held*, that the second mortgagee will not be subrogated to the mortgage discharged. *Campbell* v. *Foster Home Ass'n*, 30 Atl. Rep. 223 (Penn.).

On the ground of subrogation the case is clearly correct, since the doctrine is not applied in favor of a volunteer. Sheldon on Subrogation, sect. 240. It is suggested, however, that the principal, by accepting the payment of the first mortgage, has ratified the whole transaction, and plaintiff's mortgage is therefore valid. The principal cannot accept the benefit of the unauthorized acts of his agent, and refuse the burdens. See *Shoninger* v. *Peabody*, 57 Conn. 42; *Frank* v. *Jenkins*, 22 Ohio St. 597. As this point is not mentioned in the case, it is probable that it is not fully reported.

CONFLICT OF LAWS — VALIDITY OF DIVORCE — DEFENDANT A RESIDENT OF ANOTHER STATE. — A divorce obtained by a wife residing in Colorado against her husband, a resident of North Carolina, without personal service on the husband, *held*, to have no extra-territorial validity. *Harris* v. *Harris*, 20 S. E. 187 (N. C.).

This decision follows the early North Carolina case of *Irly* v. *Wilson*, 1 Dev. & B. Eq. 568, and attempts to distinguish *State* v. *Schlaeter*, 61 N. C. 520, which apparently overrules it. The decision in the principal case is in conflict with the weight of American authority, and the position of the North Carolina court is somewhat anomalous. While admitting that a wife may get a domicile apart from her husband for the purposes of getting a divorce, the court defeats the effect of the domicile when obtained. The reason for allowing a wife a domicile apart from her husband is that he may not defeat her right to sue by constantly changing his domicile. This object is defeated if the husband can, by removing from the State where the wife has obtained a domicile, and so getting beyond the jurisdiction of its courts, prevent the wife from getting a valid divorce. The position of the husband is somewhat peculiar; by the laws of his State he is a married man, but he has no wife, since she has been taken from him by the decree of a competent court. 2 Bish. Mar. Div. and Sep., §§ 152 et seq.

CONSTITUTIONAL LAW — POLICE POWER — DOGS. — A city council, under authority from the legislature to license dogs, passed an ordinance providing that if a dog attack a person at any place except on the premises of his owner, upon a complaint made to a police justice, if the latter is "satisfied of its truth and that such dog is dangerous, he shall order the owner to kill him immediately." Having refused to obey such an order, the relator petitioned the court to issue a writ of prohibition to compel the justice to desist in his efforts to enforce the prescribed penalty for the refusal. *Held*, the ordinance was void, as it deprived one of property without due process of law. The petition was therefore granted. *People ex rel. Shand* v. *Tighe*, 30 N. Y. Supp. 368.

That a dog is property within the 5th Amendment, has been often decided (*Jenkins* v. *Ballantyne*, 30 Pac. Rep. 760); but the authorities are in conflict as to the right to seize and confiscate such property without giving notice and granting a hearing to the owner, when there is no immediate danger to public health and public safety. Compare *Julienne* v. *Mayor*, 10 So. Rep. 43, and cases cited in Cooley, Const. Lim., 6th ed. p. 740, note 4.

CONSTITUTIONAL LAW — POLICE POWER — EXCLUSIVE PRIVILEGES. — The city of Omaha made a contract with defendant whereby he was to have the exclusive right to remove offal, dead animals, etc., from the city, paying therefor a certain sum to the city per annum. The matter of his charges was regulated also. Plaintiff, a taxpayer of Omaha, now seeks to have defendant enjoined from proceeding under this contract, on the ground that the making of the contract was unconstitutional, as the Constitution provides that "the legislature shall not pass any local or special laws . . . granting to any corporation, association, or individual any special or exclusive privileges." *Held*, the contract is good, as (1) the prohibition in the Constitution refers to the *manner* of granting such a franchise, and (2) this is not the granting of a franchise, but a valid exercise of the police power. *Smiley* v. *MacDonald*, 60 N. W. Rep. 355 (Neb.).

Regulations of this sort have been held to come within the police power in many instances. *In re Vandine*, 6 Pick. 187; *Walker* v. *Jameson*, 37 N. E. Rep. 402; Dillon, Municipal Corporations, §§ 141, 142; and the case is only interesting as showing another ingenious counsel trying to twist an exercise of the police power into a grant of a franchise, and then show the grant of that franchise to be forbidden by the Constitution.

CONSTITUTIONAL LAW — POLICE POWER — RIGHT TO CONTRACT. — A statute made it unlawful for any person or partnership to issue any policy of insurance against loss by fire without having first obtained a charter of incorporation authorizing the same. *Held*, the statute was a proper exercise of the police power, and was not in conflict with the Fourteenth Amendment of the United States Constitution, nor with the declaration in the State Constitution that all men have the inherent and inalienable right of acquiring, possessing, and protecting property. *Com.* v. *Vrooman*, 30 Atl. Rep. 217 (Pa.). Sterrett, C. J. Dean, Green, JJ., dissenting.

All the judges agreed that from the magnitude and nature of the insurance business, it was a proper subject for the exercise of the police power, and the Slaughter-house Cases (16 Wall. 36) were deemed conclusive as to the validity of the statute under the Federal Constitution. The chief point of dispute was whether the regulations of the Act were not practically prohibitive in forbidding insurance contracts by individuals. This presented a question of first impression to the court, and one upon which there was little or no authority directly in point. The majority, under a liberal construction

of the police power as one that "must necessarily enlarge its range as business expands and society develops," recognized that if the State wished to compel fidelity in the insurer and to provide a safe investment for the insured, the only way it could do so was by taking the business out of the hands of individuals over whom it had no visitorial powers, and directing it into channels that would admit the necessary measure of control. The business itself was not prohibited, nor was any one excluded from engaging in it under the conditions imposed. The decision seems sound, and it also has the merit of approving salutary and progressive legislation.

CONSTITUTIONAL LAW — PUBLIC OFFICE NOT PROPERTY. — The governor was empowered by statute to appoint a superintendent of public instruction, and also to remove him from office for incompetency, neglect of duty, or malfeasance, without a trial in a court of law. *Held*, one removed from office under this provision is not deprived of property without due process of law. *Cameron* v. *Parker*, 38 Pac. Rep. 14 (Okla.).

Offices were one class of incorporeal hereditaments by the common law, and the incumbent could not be deprived of his property without the judgment of a court. 2 Black. Com. 36. But under our representative government a public office of legislative creation has never been so regarded. It is not viewed as the subject of a grant, nor even as a contract within the constitutional provisions protecting contracts. Throop, Publ. Officers, §§ 17, 19. The legislature may increase the duties, diminish the salary, abridge the term, or abolish the office, and still be within the provisions of the Federal and State constitutions forbidding legislative interference with property and vested rights. Cooley, Const. Lim. p. 331, note 2; Hare's Const. Law, p. 650.

CONTRACTS — CONDITION PRECEDENT. — In the sale of a horse, the defendant made a cash payment and agreed to pay an additional sum if the horse would go as fast as a horse of the defendant's, the test to be made within ninety days by a person named. *Held*, that the defendant was bound to pay the additional sum on evidence that plaintiff's horse was several seconds faster than the defendant's, though no trial had been made, owing to the sickness of the horses. *Dayo* v. *Hammond*, 60 N. W. Rep. 455 (Mich.).

The case seems wrong. The defendant at the sale distinctly said that a warranty of speed would not suffice, and made a test the condition precedent to his liability to pay the additional sum. This test became impossible through no default of the defendant, and it is hard to see on what ground he is obliged to accept the testimony of witnesses when he had expressly stipulated for a trial. In the case of *Potter* v. *Lee*, 94 Mich. 140, cited by the court in support of their view, there was a clear default on the part of the buyer, which makes the case not in point.

CONTRACTS — JOINT GUARANTORS — PAYMENT BY CHECK BY ONE GUARANTOR. — Defendant and Thomas jointly guaranteed plaintiff payment of a certain rent. The rent was not paid, and plaintiff took a check from Thomas. The check having been dishonored, plaintiff brought an action against Thomas on the check and recovered judgment, but this had never been satisfied. He then sued the defendant, and the question was whether the judgment recovered on the check given by one of the joint-contractors extinguished the cause of action against the other joint-guarantor under the guarantee. *Held*, it did not. *Wegg Prosser* v. *Evans*, 11 *The Times* Law Rep. 12.

The English Court of Appeals overrule *Cambefort* v. *Chapman*, 19 Q. B. D. 229, and follow *Drake* v. *Mitchell*, 3 East, 251, to reach this result. The court seem to have been confused in *Cambefort and Chapman*, as to the exact point of *Kendall* v. *Hamilton*, 4 App. Cas. 504. It was held in the last-mentioned case that if you sue one of two or more joint-contractors *on the contract*, you cannot afterward come against the other joint-contractors, the reason being that the judgment is the higher security, and your claim is therefore merged in that. In *Cambefort and Chapman*, however, the court said that *Kendall and Hamilton* was decisive of the case, and that it decided that "when you have converted the liability on the joint contract into a liability on a judgment so that you have a security of a higher nature, . . . then the maxim *transit in rem judicatam* applies." There can be no doubt that this is the decision of *Kendall and Hamilton;* but the court in *Cambefort and Chapman* applied this to a case like the principal one, and said that there the "liability on the joint contract had been converted into a liability on a judgment." This was a mistake, as the judgment was not obtained *on the joint contract*, but on something entirely collateral, *i. e.*, the check or note. This distinction is noted in the principal case, *Drake and Mitchell*, and Dudley on Partnership, 6th ed., p. 263.

EQUITY — INJUNCTION — PIRACY OF UNPUBLISHED LITERARY MATTER. — Where a newspaper obtained the plot and incidents of a play before public production by collusion with one of the actors and published the same, *held*, an injunction will

issue on prayer of the author to prevent further publication of the material so obtained. *Gilbert* v. *Star Newspaper Co.*, 11 *The Times* Law Rep. 4.

The jurisdiction of equity has been extensively invoked to prevent publication of private manuscripts of all kinds. Story Eq. Jur., § 943. Nor is such material in any way less protected because it has not been copyrighted. In that case relief must be sought through the Federal courts, but the State courts will exercise their common-law powers without specific statutory authority. Spilling on Extraordinary Relief, § 880. The suitor is seeking protection against a threatened irreparable injury to a well-recognized right of property, and his title to an injunction is unquestioned. The English courts hold under their statute that a dramatic composition is published on its first presentation. *Boucicault* v. *Chatterton*, 5 Ch. D. 267. In America, however, it has been decided that a public presentation does not debar an author from applying subsequently for copyright for his play, or deprive him of his right to equitable relief in case of unauthorized publication. *Palmer* v. *Dewitt*, 47 N. Y. 532; *Tompkins* v. *Halleck*, 133 Mass. 32. In the principal case the play at the time of the publication complained of had not been seen by any one except the cast, and the author therefore was undoubtedly entitled to the injunction.

EQUITY — SPECIFIC PERFORMANCE — REMOVAL OF INCUMBRANCE PENDING SUIT. — A contract for the sale of land to plaintiff provided for a deed containing full covenants with warranty; but before the delivery thereof a *lis pendens* in ejectment was filed against defendant, whereupon plaintiff refused to accept the deed, and brought a suit for specific performance. Before it came to trial, the defendant's title was cleared by a judgment in his favor in the ejectment suit. *Held*, that plaintiff is entitled to a decree of specific performance. *Haffey* v. *Lynch*, 38 N. E. Rep. 298 (N. Y.).

Where, in consequence of a defect in his title, the vendor cannot perform a contract to convey real estate, equity will not grant a decree of specific performance because the court cannot enforce its judgment. Waterman on Spec. Perf., § 49. If a vendor has no title, or a defective title, to land which he contracts to sell, and subsequently obtains a perfect title, he can be compelled to perform his contract. Fry Spec. Perf., 3d. ed. 480. If the vendor perfects his title while action for specific performance is pending, equity can enforce the decree, and therefore the only objection against granting it is removed. The court say (p. 300), "A perfect title by the vendor is no part of the vendee's cause of action, and he is just as much entitled to equitable relief, and the equity of the court is just as competent to give it, whether the title of vendor was perfected before or after the commencement of the action."

EVIDENCE — HOMICIDE — ADMISSIONS BY DEFENDANT INDUCED BY PROMISES OF SAFETY. — On an indictment for murder, an admission by defendant, an infirm and diseased old woman, that she caused a person to do the killing, made to a detective disguised as a stave-getter, and induced by his statement that he was a good monger-doctor, and by his promise that if she would tell him all about it he would give her something so that she could not be caught, *held* admissible in evidence. *State* v. *Harrison*, 27 S. E. Rep. 175 (N. C.).

The general rule is, that a confession is admissible in evidence, unless obtained by temporal inducement, by threat, promise, or hope of favor held out to a party in respect to his escape from the charge against him, by a person having authority over him. Joy on Confessions, §§ 1, 2. The reason for the rule as generally given is that confessions so obtained are not reliable, as the person making them is likely to confess some crime that he has never committed, in order to avoid difficulties. In the principal case the detective had no authority over the defendant when the confession was made, and his representations were not of a nature to induce an innocent person to confess a crime which he had never committed.

EVIDENCE — PRIVILEGE — REFUSAL TO TESTIFY. — Relator in this case was summoned as a witness before the grand jury in a criminal cause. In reply to questions propounded to him by the district attorney he testified, in the broadest terms, that he had no connection whatever with the transaction which was the subject of the inquiry. When, however, further and more particular questions were put, he refused to testify, claiming the privilege on the ground that the evidence would tend to criminate himself. For such refusal he was adjudged guilty of contempt by a justice of a court of oyer and terminer. *Held*, notwithstanding witness had testified generally that he was in no way connected with the criminal offence, yet where the circumstances are such as to place him in danger of a prosecution therefor, he may refuse to testify, on the ground that his evidence may tend to criminate him. *People ex rel. Taylor* v. *Forbes, Justice*, 38 N. E. Rep. 303 (N. Y.).

This decision is consistent with the established rule. Chamberlayne's Best on Ev. (inter. ed.), 537. The judge below seems to have attached great weight to the

fact that witness had previously testified that he was in no way connected with the matter. On this point the court say: "The witness, by answering the general questions as to his connection with the affair, whether his answers were true or false, did not wave his right to remain silent when it was sought to draw from him some facts or circumstances which, in his judgment, might form another link in the chain of facts, and capable of being used under any circumstances to his detriment or peril. . . . The witness, who knows what the court does not know, and what he cannot disclose without accusing himself, must in such cases judge for himself as to the effect of his answer." On the point as to whether the criminating quality of the question is to be left entirely to the determination of witness, see 10 Oh. 336, 1 Speers (S. C. 128, which hold that it is, and 2 Greene (Ia.), 532, 9 Wis. 140, 7 Tex. 215, *contra*.

EVIDENCE — READING REPORTS TO JURY. — A telegraph company was sued for damages sustained on account of the non-delivery of a telegram, and in the course of the trial counsel for plaintiff read to the jury reports of Supreme Court cases to show that verdicts of a certain amount had been allowed by that court. *Held*, that this was wrongly permitted. *Western Union Telegraph Co.* v. *Teague*, 27 S. W. Rep. 958 (Tex.).

The Texas court has sustained a change of heart within a few years, as regards this matter. In *Railway Co.* v. *Lamothe*, 76 Texas, 222, this was said to be within the discretion of the trial court, and that the decision of the lower court would not be reversed unless a clear abuse of this discretion was shown, together with injury. In *Railway Co.* v. *Wesch*, 21 S. W. Rep. 62, the court said, again, that this was discretionary, but that they did not like it. In *Railway Co.* v. *Wesch*, 22 S. W. Rep. 957, they said it was error to allow this; and such seems to be the present law of Texas, as of most States. Such a holding is eminently desirable, as the reading reports of large verdicts must tend to increase verdicts which already are often too large, and the reports have absolutely no tendency to prove the amount plaintiff is entitled to recover in the case on trial. If it be argued that this is a matter of law, the answer is that in civil cases the counsel is not allowed to address the jury on matters of law, and, only in a few jurisdictions, in criminal cases.

PERSONS — DIVORCE — CRUELTY. — A wife, being infatuated with another man, so conducted herself toward him that she caused her husband to become unpleasantly notorious in the papers. She also neglected her household duties. The husband suffered mentally on account of this, and his health was impaired. *Held*, that this did not constitute cruelty so as to entitle the husband to a divorce; the actions of the wife not being wilful. *Ennis* v. *Ennis*, 60 N. W. Rep. 228 (Ia.).

While the decision of this case on all the facts is probably sound, still it is an interesting question how far the courts would allow a misguided husband or wife to continue this kind of behavior, though not malicious nor intended to injure the other party. It seems as if a point would soon be reached where the principle that a person must be presumed to intend the natural and probable consequences of his acts, would be applied, especially as divorce for cruelty is decreed as a protection to the injured party, and not as a punishment to the guilty one.

PERSONS — MARRIED WOMAN AS HER HUSBAND'S PARTNER — LIABILITY FOR FIRM DEBTS. — A married woman empowered to trade as a single woman, having formed a partnership with her husband, was sued for the debts of the firm. The defence set up was that the statute did not enlarge her powers toward her husband. *Held*, that the defendant, having held herself out to the world as interested in the business jointly with her husband, and as being therefore liable for the firm debts, cannot be allowed to set up that the contract between herself and her husband was invalid, in order to escape liability. *Louisville & N. R. Co.* v. *Alexander*, 27 S. W. Rep. 981 (Ky.). This case greatly extends the doctrine of estoppel of married women.

PRACTICE — SUBPŒNA DUCES TECUM — MESSAGES IN THE HANDS OF A TELEGRAPH COMPANY. — Under the general authority of the United States courts, a *subpœna duces tecum* will lie at the petition of the district attorney against the superintendent of a telegraph company, compelling him to produce telegraphic messages in aid of the investigation by a grand jury of supposed criminal acts of the senders and receivers. If the company is in no way personally interested, such messages are not privileged communications, and must be disclosed on the order of the court. *In re Storror*, 63 Fed. Rep. 564 (Cal.).

This case is one of the many which trace their origin more or less directly to the railway strikes of last summer. The grand jury of the Federal Court for Northern California in their search for the party responsible for the delay of the United States mail, obtained the subpœna in question, and the opinion is filed in denying a motion to quash the same. The judgment in the principal case is supported by decisions in Maine,

West Virginia, Iowa, and the Federal courts, although Judge Cooley has dissented strongly from this view, holding that from public policy the inviolability of telegraphic correspondence should be as complete as that by mail, and that the fundamental principles of the common law as well as our own constitutional provisions should insure immunity from such disclosure. Constitutional Limitations (6th ed.), 371, note I., 18 Am. Law Reg. N. S. 65. The decisions of the American courts on this matter are reviewed by Hon. Henry Hitchcock in his address before the American Bar Association in 1879, in which he admits the power of the courts to call for such evidence, and suggests the need of stringent legislative provisions to guard this exceptional privilege from abuse. 5 So. Law Rev. N. S. 473.

PROPERTY — DELIVERY OF DEED — EFFECT OF RECORD. — A executed a deed of land to his wife and recorded it, keeping it meanwhile in his possession. The wife did not know of such deed until a long time after it was recorded. The grantor, who had reserved a life estate to himself in the deed, subsequently conveyed the land to another. *Held*, that it was not the grantor's intention that the recording of the deed should constitute a delivery thereof, so as to pass title to his wife. *Davis* v. *Davis*, 60 N. W. Rep. 507 (Iowa).

This is in accordance with the law in most, if not in all, States. *Maynard* v. *Maynard*, 10 Mass. 456. It is to be regretted that the presumption of delivery arising from recording a deed is not conclusive. One who records a deed ought to be estopped from denying that he intended it to operate as a delivery.

PROPERTY — EMINENT DOMAIN — CONFLICTING PUBLIC USES. — A city, under its general authority to lay out streets, attempted to run a street through a railroad yard, where to do so would require the removal of a turn-table, water-tank, engine-house, and coal-dock. *Held*, that the railroad and its structures being for the public use, the city could not, under its general right of eminent domain, establish an inconsistent use, although the railroad could have located its buildings on adjoining lands owned by it, and thus the two public uses might have co-existed. *C. W. & M. R. R. Co.* v. *City of Anderson*, 38 N. E. Rep. 167 (Ind.).

A contrary decision was reached in *Railroad Co.* v. *Lake*, 71 Ill. 263. It does not distinctly appear in that case, however, that the removal of any buildings was necessitated. In accordance with the doctrine of the principal case, are *Railroad Co.* v. *Williamson*, 91 N. Y. 552, and *St. Paul Union Depot Co.* v. *St. Paul*, 30 Minn. 359. See, also, Lewis on Eminent Domain, § 266.

PROPERTY — FIXTURES — RIGHT OF REMOVAL — EFFECT OF NEW LEASE. — Where a tenant who had the right to remove fixtures erected by him on the leased premises, accepted a new lease of the premises to begin at the expiration of the existing lease, and the new lease contained no reservation of the right to remove fixtures, it was *held*, that the right to remove was lost if not exercised during the first term, although the possession was continuous. *Wright* v. *Macdonell et al.*, 27 S. W. Rep. 1024 (Tex.).

This decision is in line with the great weight of authority — see cases collected in the opinion, — the only decisions to the contrary being *Kerr* v. *Kingsbury*, 39 Mich. 150, and *Second Nat. Bank* v. *O. E. Merrill Co.*, 34 N. W. Rep. 514 (Wis.). Yet there is much to be said upon practical grounds in favor of those two decisions. It seems absurd to compel a tenant who takes a new lease, and whose possession is continuous, to remove all fixtures before the expiration of the first term, and put them up again when he starts on the second. The necessity of such a proceeding would not occur to any one unacquainted with the law, nor would the necessity of reserving the right of removal in the new lease occur to the ordinary layman, especially since the tenant has the right to remove during the first term without any express stipulation to that effect. But it does not seem likely that those two cases will be followed outside their own jurisdictions in the face of the strong current of decisions the other way.

PROPERTY — SUBTERRANEAN STREAM — RIGHTS OF SURFACE-OWNERS. — Where a subterranean stream is known to have a defined course, and is tapped by several wells, some of them sunk by the defendant city for its water-supply, whereby plaintiff's supply was cut off, it was *held*, that such use by the city was for an artificial purpose; that no one owner can use for artificial purposes an unreasonable quantity of water to be determined by the circumstances of the case; that each having an equal right to the water, no one can so exercise his right as to wholly deprive another of its use. *Willis* v. *City of Perry*, 60 N. W. Rep. 727 (Iowa).

This rule has become well established, though, from the nature of the facts, cases in its support must be comparatively rare.

PROPERTY — WILLS — INTEREST ON LEGACY. — *Held*, that a legacy given to a wife in lieu of dower draws interest from date of testator's death, in the absence of anything in the will showing a contrary intention. *Stevens* v. *Stevens*, 30 N. Y. Supp. 625.

This exception to the general rule, that interest on a legacy does not begin to run until one year from testator's death, is well established in New York and Massachusetts, but has not obtained a footing elsewhere. The United States courts, England, Pennsylvania, and New Jersey have refused to recognize it. On principle, there is not the same reason for allowing interest in this case as in the case of a legacy for the maintenance of children; for the wife, having her election to claim dower, or the legacy if she chooses the latter, ought to take it as any other adult legatee would.

PROPERTY — WILLS — PROOF OF EXECUTION. — A will was signed in handwriting not testator's. It was attested by the requisite number of witnesses, before whom testator had acknowledged it to be his will. *Held*, that there was evidence from which a jury might find that the will was signed by a third person in testator's presence, as required by statute, MacFarlane, J., dissenting. *Walton* v. *Kendrick*, 27 S. W. Rep. 872 (Mo.).

The reasoning of the majority is that an acknowledgment of the will to attesting witnesses is just as effectual to prove that the will was signed by a third person in testator's presence as that it was signed by testator himself. This is unsound. The acknowledgment only makes out a *prima facie* case that testator signed the will; and if there is evidence, as here, that testator did not sign, then the proponent of the will is under the duty of establishing that he did sign or did what was by statute equivalent to signing. This, proponent has here utterly failed to do, having offered no evidence at all having the slightest tendency to prove the execution.

TORTS — CONTRIBUTORY NEGLIGENCE. — *Held*, that certain facts, although strong evidence, do not constitute contributory negligence *per se*. Doctrine of comparative negligence repudiated. *North Chicago St. R. Co.* v. *Eldridge*, 38 N. E. Rep. 246 (Ill.). See NOTES.

TORTS — IMPUTED NEGLIGENCE. — In an action for injuries to the plaintiff's wife, caused by negligence of defendant company together with the negligence of the wife, *held*, that in a State where the wife has been released from her common-law restrictions, and the husband from all responsibility for the wife's torts, her contributory negligence will bar the husband's action. *C. B. & Q. R'y Co.* v. *Honey*, 63 Fed. Rep. 39 (Iowa).

The Circuit Court of Appeals reverse the decision of the Circuit Court in this case, which was reported in 59 Fed. Rep. 423, and was mentioned among the recent cases, 8 HARVARD LAW REVIEW, 63.

TORT — NEGLIGENCE — ACTION TO RECOVER DAMAGES FOR PERSONAL INJURIES. — An action to recover damages for injuries received through the negligence of a railway porter is an action founded on tort within the meaning of the County Courts Act. *Taylor* v. *M. S. & L. R'y*, 11 *The Times* Law Rep. 27.

This case furnishes an illustration of the difficulties which frequently confront judges in the application of legislative innovations in procedure. Every one knows that there is a border-land between torts and contracts, and that the best minds may differ as to the division in which a given case properly falls. The progress of assumpsit and of detinue from the one fold to the other is a good example of the yielding nature of their boundaries. Pollock on Torts, Appendix A. But in the English County Courts Act of 1486, the antithesis is sharply drawn, and costs taxed differently as the action is "founded on contract" or "founded on tort," and this distinction is preserved in all the amendments of the Act. The judges are therefore called upon repeatedly to say whether causes sound in contract or tort which may belong in either or neither, and to settle questions which could not have arisen at all under the old forms of action. In the present case the decision seems clearly correct. There is no reason why a railway should escape liability in tort for active misfeasance because it happens to be liable also in contract, if the passenger prefers to put his case upon that ground; and as in modern English procedure the nature of the complaint is gathered from the statement of facts, the plaintiff should be entitled to that construction most favorable to himself. It is by no means clear, however, that misfeasance by a common carrier may be regarded as a tort at election; and there is eminent authority to the effect that such injury is in its nature essentially a breach of contract. Holland on Jurisprudence, 222, 223.

TORTS — NEGLIGENCE — BURSTING SEWER — LIABILITY OF CONTRACTOR. — Defendant, a sewer contractor, agreed that the work should be performed in accordance with certain plans, and that the city engineer should have supervision and management of the construction, — the city reserving not only the power of changing the specifications as the engineer should see fit, but also a control over the manner of performing the work. The construction-trench was lined with planking to prevent caving. The

brick-work having been completed, the engineer directed that the planking remain in place, and that the trench be filled by puddling, and not by tamping, as required by original contract. His directions were followed, and, the earth having subsequently settled, a service-pipe was wrenched from its connection at the main by the pressure of the planking upon it. Four months later, the sewer having been completed and accepted by the city, the street caved in, and serious damage was found to have been done to the foundation of plaintiff's church, by the water flowing from the main and the sewer, which was found broken at that point. The cave-in was the first indication of any defect. Plaintiff sought to charge defendant as an independent contractor; but it was *held*, that he did not bear that relation to the city, since it reserved not only the power to direct as to the results of the work, but also the control over the manner of performing it, and had directed that the planking remain. As an additional *ratio decidendi*, the court applies the rule of *Curtin* v. *Somerset*, 140 Pa. St. 70, where it was held that an independent contractor owes no duty to third parties after the work has been taken off his hands by the owner. The causal connection between the contractor and the third party, in the event of damage, is taken to have been broken by the interposition of an independent responsible agent (Whart. Neg. §§ 438, 439), and contractor is not liable to such third party. *First Pres. Cong.* v. *Smith*, 30 Atl. R. 279 (Pa.).

By adhering to *Curtin* v. *Somerset*, the Pennsylvania court again affirms the doctrine for which the case of *Winterbottom* v. *Wright*, 10 M. & W. 109, is usually taken to stand. In England, a disposition has been shown to avoid the hardship of so strict a rule (*George* v. *Skivington*, L. R. 5 Ex. 1; *Heaven* v. *Pender*, L. R. 11 Q. B. D. 503); and the same is true of several jurisdictions in this country. See *Blood Balm Co.* v. *Cooper*, 83 Ga. 457; *Shubert* v. *Clark Co.*, 51 N. W. R. 1103 (Minn.). The New York case of *Thomas* v. *Winchester* (6 N. Y. 397) might seem a departure from the strict rule, but the effect of that case was limited by two later decisions in the same jurisdiction. *Loop* v. *Litchfield*, 42 N. Y. 351; *Losee* v. *Clute*, 51 N. Y. 494.

TORTS — NEGLIGENCE — DUTY OF CONTRACTOR TO ONE NOT A PARTY TO THE CONTRACT. — The defendant agreed with a company to furnish staging for work which the company was to do on defendant's elevator. Deceased was killed by a fall caused by a defect in the staging, while he was thereon in the employ of the company. In an action by his administrator, it was *held*, that the defendant owed a duty to the deceased to exercise reasonable care, because there was an implied invitation to him to use the staging, and because there is a duty on every one to avoid acts imminently dangerous to human life. *Bright* v. *Barnett & Record Co.*, 60 N. W. Rep. 418 (Wis.).

The facts of this case are in effect those of *Heaven* v. *Pender*, L. R. 11 Q. B. Div. 503, cited by the court; and the decision is put on the same grounds, either of which seems sufficient to support it. The second principle, however, is too broadly stated, and must be taken with reference to the facts. It is a case of the first impression in Wisconsin, though abundant authority is cited from other jurisdictions.

TORTS — NEGLIGENCE OF MASTER — DUTY TO GUARD DANGEROUS MACHINERY — WAIVER. — Laws 1892, c. 673, require machinery to be properly guarded, and provide that a neglect so to guard shall be criminal. Plaintiff, who had worked in defendants' factory some two years, was injured, in the course of his employment, by having his hand caught in a gearing. The jury answered the question as to contributory negligence and as to the sufficiency of the guard, in plaintiff's favor. It was *held*, that the plaintiff could recover, and that he could not waive the statutory protection. *Simpson* v. *New York Rubber Co.*, 30 N. Y. Supp. 339.

The decision as to the latter point goes upon the ground of public policy, and the case is taken as analogous to those arising under the usury statute, and also under the statute regulating the charges for elevating grain. It is admitted that "a servant accepts the service subject to the risks incident to it," and where, upon entering the employment, the machinery is of a certain kind and condition, to employé's knowledge, he voluntarily assumes the risk involved in their use, "and can make no claim on the master to furnish other or different safeguards" (*Sweeney* v. *Envelope Co.*, 101 N. Y. 520). It is also admitted that parties can waive statutory provisions for their benefit, and can even make law for themselves which the courts will enforce, provided it is a matter exclusively of private right, and there is not, as here, a question of public policy involved (*Sentemis* v. *Ladew* 140 N. Y. 463). It is important to notice that Dykman, J., merely concurs in the result; while Brown, P. J., does not agree that an employé cannot waive the statute, so far as it may be treated as having been enacted for the employé's benefit and protection, though he concurs in affirming the judgment. He points out that the rule laid down excludes not only waiver by continued use, but also waiver by express stipulation, and refuses to express an opinion upon it. On the whole, the case is not a strong authority for the proposition enunciated.

TORTS — TELEPHONE WIRES — INTERFERENCE BY OTHER WIRES — INJUNCTION. — A telephone company received a franchise under which it erected poles and strung wires along the streets. Three years later, a like authority was given to and acted upon by an electric-lighting company, to the serious impairment of the telephone service. It was found that the wires of the two companies were within four feet of each other, that there was sufficient room along the streets for the lighting company to string its wires at a distance greater than four feet, and that such alteration on the part of the lighting company would be attended with greater expense than one on the part of the telephone company. It seems also to have been found that a space of four feet or more between wires would have obviated the difficulty. An injunction issued in favor of the telephone company, the lighting company being compelled to make the changes above indicated, on the ground of priority only, it would seem, as no cases are cited. *Paris Electric Light, &c. Co.*, v. *S. W. Telegraph, &c. Co.*, 27 S. W. Rep. 902 (Tex.).

The question whether, of two corporations using electric currents of varying powers, the more recent, if using the stronger, shall so carry on its business as not to impair the service already existing, or whether the one suffering from the proximity shall, in all cases, make at its own expense all changes necessary to the maintenance of its service, can hardly be said to be as yet settled. Contests between telegraph or telephone companies and electric-lighting companies have seldom risen to the higher courts, their difficulties being settled at a comparatively slight cost to either party. *Neb. Tel. Co.* v. *York Gas, &c. Co.*, 17 Neb. 284, accords with the principal case; while *West. U. Tel. Co.* v. *Champion Electric Co.*, 14 Cinc. W'kly Bull. 327 (Ohio), is *contra*.

A more serious contest, from the nature of the service, has arisen between the telephone companies and the electric street railway companies. The authorities are conflicting, and are collected in Thompson on Electricity, pp. 52–58, and especially in Keasbey on Electric Wires, pp. 141–153, where the matter is elaborately discussed.

TRUSTS — APPLICATION OF TRUST-RES AT DISCRETION OF TRUSTEE. — Testator gave his property to trustees upon certain trusts, and directed the trustees to invest certain sums for the benefit of his sons, and apply these sums to the advancement of the sons, as the trustees in their discretion should think fit. *Held*, that the sons were absolutely entitled to the legacies, freed from the exercise of any discretion on the part of the trustees. *In re Johnston*, L. R. [1894] 3 Chan. Div. 204.

This follows the rule that where the trustees are to apply the entire amount for the benefit of the cestui, the bequest is to be treated as a gift out and out.

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# REVIEWS.

COURTS AND THEIR JURISDICTION. By John D. Works. Cincinnati: The Robert Clarke Co. 1894. 8vo. pp. 908.

The task Judge Works has set himself, the fulfilment of which gives us this book, is one that has been immensely complicated by the great number of statutes and provisions in the constitutions defining the powers of the various courts. One constantly is reminded of this by the qualifications the author feels himself compelled to put on various statements, to the effect that "the tendency of legislation" seems to be against this or that. Yet out of the chaotic mass of decisions and legislative directions on the subjects treated, he has given us a *résumé* of the doctrines laid down, with a good discussion of the principles on which the various theories are based. The author candidly admits that many of the cases go on no principle at all save that of precedent, but states as the object of the work, "to get below this mass of cases which rest upon one another, and find out why a given principle of law should be maintained, and cite the cases by which the reason for the rule has been established." On this very commendable plan he has treated the means of acquiring and losing jurisdictions, jurisdiction of judges,